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No. 94-2064

In The

Supreme Court of the United States

October Term, 1995

PAUL PFINGST, District Attorney of
San Diego County, California,

Cross-Petitioner,

v.

SYCUAN BAND OF MISSION INDIANS, *et al.*,

Cross-Respondents.

Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the District Attorney of San Diego County have jurisdiction to prosecute non-Indian agents of the Sycuan, Barona, and Viejas Tribes for slot machine gambling on Indian lands in violation of Cal. Pen. Code § 330.1, when the conduct was sponsored by the Tribes in contravention of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2710(d)(1)(B), (C)?

2. Did the district court have jurisdiction to interdict pending state criminal proceedings, on petition of third-party Indian Tribes, when the state court prosecutions did not interfere with any federal prosecution and furthered the congressional purpose of limiting class III gaming on Indian lands to only permissible gaming activities that are regulated by a tribal-state compact?

LIST OF PARTIES TO THE PROCEEDING

Paul Pfingst, District Attorney of San Diego County, California[1]
Sycuan Band of Mission Indians
Barona Band of Mission Indians
Viejas Band of Mission Indians
Jim Roache, former Sheriff of San Diego County, California

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[1] When the proceedings below were initiated against the District Attorney of San Diego County, the name of the incumbent was Edwin L. Miller. Pursuant to Sup.Ct.R. 35.3, Mr. Miller's successor in office, Paul Pfingst, is substituted as a party herein.

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JURISDICTION OF THE COURTS BELOW

Plaintiff and petitioner Indian Tribes invoked the district court's jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337, and 1362, alleging claims arising under 42 U.S.C. § 1983 and the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* Jurisdiction under these sections was not disputed in the district court; however the District Attorney argued that, as a jurisdictional matter, dismissal of the complaints was required pursuant to *Younger v. Harris*, 401 U.S. 37 (1971). The District Attorney also argued that the district court lacked jurisdiction to enjoin the state court proceedings under 18 U.S.C. § 2283. Both jurisdictional defenses were rejected by the courts below. Pet. Appx. A-12 – A-14, B-20 - 23, B-26.

In the Court of Appeals, the District Attorney argued that the Tribes could not base subject matter jurisdiction on claims arising under 42 U.S.C. § 1983, since the Tribes were grounding their claim on an alleged violation of sovereignty and, to that extent, could not be a "person" for purposes of bringing suit under the Civil Rights Act. The Court of Appeals declined to address the point, finding that the district court had jurisdiction under 28 U.S.C. § 1331 for the reason that "the case clearly arises under federal law, be it IGRA or the federal common law of Indian affairs. . . . " Pet. Appx. A-7.

In this Court,[2] the District Attorney contends that the district was without subject matter jurisdiction for lack of

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[2] Lack of jurisdiction may be raised at any stage of the proceedings. *See, Renne v. Geary*, 501 U.S. 312 (1991).

a justiciable controversy within the meaning of Article III of the Constitution.

CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-Petitioner Paul Pfingst, District Attorney of San Diego County, California, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit. Cross-Petitioner does not seek review of that portion of the court's judgment finding that electronic gambling devices seized from the Sycuan Reservation constitute class III gaming. Cross-Petitioner prays that the Writ issue on this Cross-Petition whether or not a Writ issues on Petition of the Sycuan Band of Mission Indians in this matter.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1166. Gambling in Indian country

(a) Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.

. . . .

(c) For the purpose of this section, the term "gambling" does not include –

(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or

(2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under 25 U.S.C. § 2710(d)(8) that is in effect.

(d) The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under 25 U.S.C. § 2710(d)(8), or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

25 U.S.C. § 2701. Congressional findings

The Congress finds that –

. . . .

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

25 U.S.C. § 2710. Tribal Gaming Ordinances

. . . .

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are –

. . . .

(B) located in a State that permits such gaming for any purpose by any person, organizations, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

. . . .

28 U.S.C. § 2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

OPINIONS BELOW

Cross-Petitioner adopts the descriptions set forth at page 2 of the Petition. In this Cross-Petition, references to the decisions of the courts below will be by citation to pages of the Appendix accompanying the original Petition (Pet. Appx. ___).

JURISDICTIONAL STATEMENT

Cross-petitioner adopts the statement of this Court's jurisdiction set forth at page 2 of the Petition.

Cross-petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254.

SUMMARY OF FACTS

In the Fall of 1991, three California Indian Tribes installed in their casinos and offered to their patrons gambling devices that constitute slot machines[3] prohibited under the California Penal Code.[4] Pursuant to Public Law 280, 18 U.S.C. § 1162(a), law enforcement officials from San Diego County seized the machines. Pet. Appx. I-4 – I-5. Following the seizure, misdemeanor prosecutions were commenced against non-Indian management officials of the casinos.[5]

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[3] It was never seriously disputed by the Tribes that, if permitted to do so, the District Attorney could prove that the confiscated devices did, in fact, constitute "slot machines" within the meaning of Cal. Pen. Code § 330.1. The Tribes did allege that the devices constitute merely "technologic aids" to the play of *class II* games, *see* 25 U.S.C. § 2703(7)(A)(i), rather than "electronic or electromechanical facsimiles of any game or chance or slot machines of any kind," which constitute *class III* gaming under IGRA. 25 U.S.C. § 2703(7)(B)(ii). Only the Sycuan Band, however, sought summary judgment on that argument, and that effort was unsuccessful. Pet. Appx. D, E. By stipulation of the parties, analogous claims of the Barona and Viejas Bands, were dismissed. CR 110.

[4] Slot machines are prohibited by Cal. Pen. Code §§ 330a, 330b, and 330.1.

[5] There was no dispute that state criminal defendants James Trant, Emmett Munley, or Helen Chase are not Indian.

The Tribes sued to enjoin future enforcement of Cal. Pen. Code § 330.1 on their Indian lands and to interdict the pending state criminal prosecutions. The district court granted the Tribes' motion for summary judgment on their claim that the county officials lacked jurisdiction under Public Law 280 and under Section 23 of the Indian Gaming Regulatory Act (IGRA), 18 U.S.C. § 1166(d), to seize the gambling devices and to initiate criminal prosecutions. Pet. Appx. B-1 – B-2. The court issued a permanent injunction against the District Attorney, but declined to issue an injunction against the Sheriff. Pet. Appx. B-19 – B-20, C-2 – C-3. By subsequent stipulation of the parties, the action against Sheriff Roache was dismissed, Pet. Appx. H, and an appeal was taken by the District Attorney alone.

The Court of Appeals affirmed the judgment of the district court both as to the Class III classification of Sycuan's Autotab Model 101, Pet. Appx. A-14 – A-20, and

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There is an unresolved question whether criminal proceedings were actually ever initiated against Viejas Tribal Chairman Anthony Pico, a member of the Viejas Tribe and the only Indian alleged to be among the criminal defendants. The district court stated that criminal proceedings were initiated against Mr. Pico, Pet. Appx. I-5; however, in the Court of Appeals, the District Attorney sought to correct this factual error by submitting a declaration and requesting the appellate court to take judicial notice of the fact that criminal proceedings had never been commenced against Mr. Pico. See Declaration of William J. Collins attached hereto as an Appendix. Although the Viejas Tribe did not dispute the District Attorney's assertion of the true facts about the prosecution of its chairman, the Tribe did oppose the request for judicial notice, and that request was summarily denied. The opinion of the Court of Appeals states that criminal prosecutions were commenced against "four persons" of unspecified identity. Pet. Appx. A-6.

as to the jurisdiction of the District Attorney to prosecute for violation of the state slot machine prohibitions. Pet. Appx. A-8 – A-12.

REASONS FOR GRANTING THE WRIT

A. The Writ Should Issue To Determine Whether, Under The Facts In This Case, California Is Preempted By 18 U.S.C. § 1166(d) From Enforcing Cal. Pen. Code § 330.1 Against Slot Machine Gambling On Indian Lands

The Court of Appeals held that, by its terms, 18 U.S.C. § 1166(d) divests California of jurisdiction under Public Law 280 to enforce its gambling laws against the Tribes here. Pet. Appx. A-11 – A-12. IGRA does not *expressly* repeal Public Law 280, and the District Attorney argued below that, under recognized principles of statutory construction, no *implied* repeal should be found if the two statutes could be harmonized. *See United States v. Cook*, 922 F.2d 1026, 1033 (2d Cir. 1991); *see also, Randall v. Loftsgaarden*, 478 U.S. 647, 661 (1986). The Ninth Circuit did not opine upon the compatibility of the two statutes.

Public Law 280 is not *sine qua non* to California's jurisdiction over slot machine gambling by Indian Tribes. This Court has never recognized "an inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-215 (1987) (hereafter, *Cabazon*).

In respect to gambling, Congress recognizes an exclusive right in Indian Tribes to regulate gaming activity

only "if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5) (emphasis added).[6] Accordingly, when Tribes do not have the exclusive right to regulate a gaming activity, the exercise of a State's jurisdiction to control the activity should be subject to a balancing of federal, tribal, and state interests. *Cabazon*, at 214-222.

The District Attorney respectfully submits that, unlike bingo, slot machine gambling is *categorically* prohibited in California and is, therefore, prohibited in the State "as a matter of criminal law and public policy." Cal. Pen. Code §§ 330a, 330b, 330.1; *cf.*, Cal. Pen. Code § 326.5 [charity bingo]. Since Congress has not recognized a right in California Indian Tribes to regulate prohibited slot machine gambling, 25 U.S.C. § 2701(5), it is not necessary to read 18 U.S.C. § 1166(d) as totally ousting California of jurisdiction to enforce Cal. Pen. Code § 330.1 against the Tribes or tribal members – whether pursuant to Public Law 280 or inherent state police powers. Stated otherwise, federal jurisdiction under 18 U.S.C. § 1166(d) is only incompatible with state enforcement of state gambling laws in those cases where exclusivity of federal criminal jurisdiction reflects a congressionally recognized *exclusive* tribal right to regulate the disputed gaming activity. Where, under the terms of 25 U.S.C. § 2701(5), a

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[6] In practical effect, the Tribes' exclusive "right to regulate" class III gaming amounts to the right of the Tribe to determine to permit class III gaming at all. For the actual *regulation* of class III gaming is a matter to be worked out between the Tribe and the State in a tribal-state compact. 25 U.S.C. § 2710(d)(1)(C).

Tribe has no regulatory jurisdiction at all or, at best, only a right to regulate concurrently with the State, insistence on exclusive federal jurisdiction serves no apparent congressional purpose.

Furthermore, where, as here, the alleged criminal conduct is conducted by non-Indians at the direction of Indian Tribes, to the prejudice of the public health, safety, and welfare of the citizens of the State,[7] and in *defiance* of congressional purpose, *see* 25 U.S.C. § 2710(d)(1)(B), (C), the Tribes exceed the scope of their sovereignty. *See, Montana v. United States*, 450 U.S. 544, 565-566 (1981);

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[7] The Court is requested to take judicial notice of the fact that when, as here, a class III gaming activity is impermissible on Indian lands and is, therefore, conducted in the absence of a tribal-state compact, the activity, including the books and financial records of the casino operation, is wholly without oversight by any federal or state agency; the National Indian Gaming Commission has jurisdiction to monitor only *class II* gaming. 25 U.S.C. § 2706(b)(1). F.R.Evid. 201. In this regard, the Court is also requested to take judicial notice of the fact that, in 1994, the United States filed a 23-count indictment against the operator of the Morongo Band's casino in California, under the Organized Crime Control Act (OCCA), 18 U.S.C. § 1955, charging, among other things, money laundering and use of a facility in interstate commerce in aid of racketeering (18 U.S.C. § 1952) – all arising out of the operation of slot machines in violation of Cal. Pen. Code § 330b. *United States v. E.C. Investments, Inc.*, No. CR-94-361-RG, app. pending, 9th Cir. No. 94-5063. The indictments connected with the Morongo Reservation casino were dismissed by the district court on the ground that, under the prohibitory/regulatory test adopted by this Court in *Cabazon*, Cal. Pen. Code § 330b is "regulatory" and, therefore, use of slot machines cannot be the basis for charging under the OCCA. *See, United States v. Farris*, 624 F.2d 890 (9th Cir. 1980), cert. denied, 449 U.S. 1111 (1981).

South Dakota v. Bourland, ___ U.S. ___, 113 S.Ct. 2309, 2320 n.15 (1993) ("[A]fter *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation[ ]' and is therefore, *not*, inherent.") In such a case, tribal assertion of 18 U.S.C. § 1166(d) as a bar to state criminal prosecutions becomes a sword to *defeat* the plan of IGRA, rather than a shield to preserve any legitimate aspects of tribal sovereignty.

Finally, to permit the Tribes to flout the congressional scheme by operating slot machines in violation of 25 U.S.C. § 2710(d)(1)(B) and (d)(1)(C), staying the hand of the State while awaiting discretionary action by the United States, is to ignore Congress' purpose in enacting Public Law 280 in the first instance. That purpose was to remedy the inability of the Federal Government adequately to protect both on-reservation and off-reservation residents from lawlessness in Indian country. *See*, Carol E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. Rev. 535, 540-541 (1975). It is not likely that the Federal Government is in a much better position today than it was in 1953 to enforce state gambling laws on California's 100 or so Indian Reservations, *see* 53 Fed.Reg. (No. 250) 52829 (December 29, 1988). Indeed, the acknowledged inability of federal agencies to oversee casino gambling on Indian lands, generally, was one of the considerations behind incorporation of *state* regulation of casino gambling through the mechanism of a tribal-state compact. *See*, S. Rep. 446, 100th Cong., 2d sess., p. 5 (1988).

The Court of Appeals should have considered all of these issues in deciding whether state enforcement of Cal.

Pen. Code § 330.1, under inherent police powers or pursuant to Public Law 280, is irreconcilably inconsistent with 18 U.S.C. § 1166(d). This Court should grant the Writ to do so.

B. The Writ Should Issue To Determine Whether IGRA Divested California Of Its Inherent Jurisdiction Over Non-Indians Committing "Victimless" Crimes On Reservations.

Even if California were without power to enforce Cal. Pen. Code § 330.1 against tribal officials, the state court defendants here were non-Indians. (*See* note 5, *supra*.) In the Court of Appeals, the District Attorney argued that California has inherent, sovereign jurisdiction over non-Indians violating state laws on Indian lands, except where the offense is committed against the person or property of an Indian. *See McBratney v. United States*, 104 U.S. 621 (1881); *Draper v. United States*, 164 U.S. 240 (1896); *New York ex rel. Ray v. Martin*, 326 U.S. 496, 500 (1946); *United States v. Wheeler*, 435 U.S. 313, 324 n. 21 (1978); *see also, Duro v. Reina*, 495 U.S. 676, 679 n. 1 (1990).[8] This rule has been applied to find state jurisdiction over "victimless" crimes committed by non-Indians

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[8] Although the non-Indian status of the criminal defendants was never disputed by the Tribes (*see* note 5, *supra*), the significance of that status for purposes of analyzing California's criminal jurisdiction was raised for the first time in the Court of Appeals, in response to claims by the Tribes of a sovereign right to sue on behalf of their agents. The Court of Appeals denied the Tribes' motions to strike the argument concerning state jurisdiction over non-Indians, and the matter was fully briefed and argued in the appellate court.

within Indian country. *See e.g., State v. Snyder*, 807 P.2d 55 (Idaho 1991) and authorities cited therein; *see also*, Wm. C. Canby, Jr., *American Indian Law (2d ed.)* 140 (West 1988) [States have exclusive jurisdiction over "victimless crimes" committed by non-Indians in Indian country].

Inasmuch as Public Law 280, by its very terms, concerns only state jurisdiction over offenses committed *by or against Indians*, that statute is irrelevant to a determination of California's jurisdiction over the non-Indian state defendants.[9] The Court of Appeals made no effort to analyze the extent of California's jurisdiction, following enactment of IGRA, over the non-Indian defendants. To the extent that the Court of Appeals may have assumed that 18 U.S.C. § 1166(d) swallowed up California's jurisdiction over non-Indians as well as over Indians, the court gave no attention to the factors discussed in paragraph A above that argue in favor of California's *concurrent* right to regulate the operation of slot machines on Indian lands, i.e., factors that would harmonize state criminal jurisdiction over non-Indians with 18 U.S.C. § 1166(d).

Moreover, congressional efforts to divest States of their jurisdiction over Indian country gambling crimes

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[9] Even assuming, *arguendo*, that a Tribe, in some circumstances, might cloak its non-Indian agents with immunity against state criminal prosecution, a proposition for which there is no known authority, the Tribes certainly could not do so here. In this case, both the Tribes and their agents were acting in violation of federal law by operating on Indian lands gambling devices that are prohibited by state law, *see* 25 U.S.C. § 2710(d)(1)(B), and, in any event, without a tribal-state compact, *see* 25 U.S.C. § 2710(d)(1)(C).

committed by non-Indians present an obvious conflict between Congress' power respecting Indian matters and the States' sovereign power to regulate, in the public interest, the conduct of persons within state boundaries. *Cf., James v. Duro Contracting Co.*, 302 U.S. 134 (1975) [Allocation of legislative jurisdiction over territory within the political domain of one of the sovereign states is a matter of agreement between two sovereigns].[10] In light of these tensions, this Court should issue the Writ to consider whether a balancing test should be applied here for the purpose of determining whether, under the facts presented in this case, California's interest in enforcing its slot machine prohibitions uniformly within the State outweighs the federal and tribal interests reflected in 18 U.S.C. § 1166(d). *Cf., Cabazon, supra*, 480 U.S. at 214-222. Cross-Petitioner submits that where, as here, the activity is being undertaken in defiance of federal law, the tribal interests are non-existent, and California's interest in enforcing its slot machine prohibitions should prevail. Indeed, in this regard, California interest is entirely consistent with Congress' purposes.[11]

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[10] The Court may take judicial notice of the fact that the Indian Reservations involved in this litigation were all created by executive order after California's entry into the Union. No part of this territory was reserved in the Act of Admission. *United States v. Bateman*, 34 F. 86, 88, 89 (Cir. Ct. N.D.Cal. 1888).

[11] If the Tribes had harbored any genuine doubts about whether these machines constituted class III gaming, the Tribes could have brought an action against the San Diego County Sheriff for a declaration as to their status. 28 U.S.C. §§ 2201, 2202; *cf., Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (1982); *Cabazon Band of Mission Indians v. County of Riverside*, 783 F.2d 900 (1982), *aff'd., Cabazon, supra*, 480

C. The Writ Should Issue To Clarify The Limits Of The Prohibitory/Regulatory Test Adopted By The Court In *Cabazon*.

As noted above, the District Attorney contends that, under the facts of this case, California's jurisdiction under Public Law 280 can and should be harmonized with federal jurisdiction pursuant to 18 U.S.C. § 1166(d). But, moreover, he urges that the Writ issue to settle the point that Cal. Pen. Code § 330.1 is "criminal/prohibitory" within the meaning of *Cabazon* and that, therefore, California has jurisdiction, under Public Law 280, to enforce Cal. Pen. Code § 330.1 where, as here, the unlawful conduct is being sponsored by an Indian Tribe in violation of IGRA. *Cf. People v. Snyder*, 532 NYS2d 827 (1988) [New York slot machine prohibition enforceable on Indian lands].

In *Cabazon*, the Court considered the question whether California has jurisdiction to enforce Cal. Pen. Code § 326.5 against Indian Tribes pursuant to "Public Law 280," 18 U.S.C. § 1162(a).[12] Adopting a "prohibitory/regulatory" standard, *see Bryan v. Itasca County*, 426 U.S. 373 (1976); *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (8th Cir. 1981), cert. denied, 455 U.S. 1020 (1982); *Barona Group of Capitan Grande Band of Mission Indians v. Duffy, supra*, 694 F.2d 1185 (9th Cir. 1982), cert. denied,

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U.S. 202. Instead, seeking shelter behind 18 U.S.C. § 1166(d) and this Court's decision in *Cabazon*, the Tribes elected to install the devices and simply force the issue with county law enforcement officials.

[12] Section 326.5 specifies the terms and conditions under which bingo may lawfully be played in California.

461 U.S. 929 (1983), the Court held that "Pub. L. 280 does not authorize California to enforce Cal. Penal Code Ann. § 326.5 (West Supp. 1987) within the Cabazon and Morongo Reservations." *Cabazon*, 480 U.S. at 212.

The Court stated that the "shorthand test [for the prohibitory/regulatory distinction] is whether the conduct at issue violates the State's public policy." 480 U.S. at 202. However, the Court went on to describe those limited forms of gambling that are permitted in California, and concluded that "California regulates rather than prohibits *gambling in general* and bingo in particular." *Id.* at 211 (emphasis added). The Court's formulation has led other courts to conclude that even violation of a categorical prohibition may nevertheless constitute something *other* than a violation of public policy. *Cf., Cabazon, supra*, 480 U.S. at 211 n. 10. Thus, the district court below made the anomalous statement that California's "slot machine *prohibition* is a *civil/regulatory* law." Pet. Appx. B-7 (emphasis added).[13] Furthermore, those courts that have relied on the *Cabazon* test for the purpose of determining whether a gaming activity is "permitted" in a State within the meaning of IGRA, *see* 25 U.S.C. §§ 2710(b)(1)(A), (d)(1)(B), have similarly found that a State's

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[13] The Barona and Viejas Tribes characterized California's slot machine prohibitions as "a prohibitory island in a regulatory sea," Br. of Appellees Barona Band and Viejas Band, p. 14. While grandiloquent, the description can obviously render the rule meaningless – depending on how vastly one's "sea" is defined. The District Attorney believes that California's relevant "regulatory sea," for example, should be described as *non-casino* style gambling, e.g., lotteries, parimutuel wagering on horse racing, and charity bingo. In contrast, the Tribes define the relevant "sea" as gambling in any form.

"regulatory sea" of "gambling," eclipses state "prohibitory islands" against slot machines or other forms of casino gambling. *See, Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F.Supp. 480, app. dismissed, 957 F.2d 515 (7th Cir. 1992), cert. denied, 113 S.Ct. (1992); *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 363-367 (8th Cir. 1990); *Ysleta del Sur Pueblo v. Texas*, 852 F.Supp. 587 (W.D. Tex. 1993), rev'd on other grounds, *Ysleta del Sur Pueblo v. Texas, supra*, 36 F.3d 1325, cert. denied. 115 S.Ct. 1358 (1994).

Certainly, it would not be an exaggeration to state that the "prohibitory/regulatory" dichotomy approved by this Court in *Cabazon*, and the application of that dichotomy in the case of California, is responsible for virtually all of the litigation between Indian Tribes and States under IGRA.[14] Armed with an expansive characterization of the *Cabazon* test and the sweeping application thereof by some courts, Tribes sue States for bad faith refusal to negotiate when States protest that the gaming activity demanded by the Tribe is prohibited within the State. *See* 25 U.S.C. § 2710(d)(7)(A)(i)

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[14] Indeed, the Court's *Cabazon* analysis can be said to be responsible for virtually all recent litigation, generally, between States and Tribes, as Tribes and their members seek to limit state criminal jurisdiction in Indian country. *See e.g., Confederated Tribes of Colville Reservation v. Washington*, 938 F.2d 146, 148-149 (9th Cir. 1991), cert. denied, 112 S.Ct. 1704 (1992) [Washington may not enforce speed limits in Indian country]; *St. Germaine v. Circuit Court*, 938 F.2d 75, 77 (7th Cir. 1991), cert. denied, 112 S.Ct. 1704 (1992) [Wisconsin may enforce its driving license requirement in Indian Country]; *Quechan v. Mullen*, 984 F.2d 304 (9th Cir. 1993) (state law prohibiting only specified fireworks is "prohibitory"); *see also, Serian v. State*, 588 So.2d 251 (Fla. App. 1991) [unlike state licensing of hunting and fishing, state licensing of optometrists is "criminal/prohibitory"].

[conferring jurisdiction over suits "bad faith" suits by Tribes against States]. Indeed, in one of the earliest decisions under IGRA, a Court of Appeals found Connecticut to have exhibited bad faith *per se* by refusing to negotiate with a Tribe on the ground that the gaming activities demanded by the Tribe are prohibited by state law. *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1032-1033 (2d Cir. 1990), cert. denied 499 U.S. 975 (1991).

In California, sixteen Indian Tribes demanded that the State negotiate about casino-style games that are categorically prohibited by State law, relying on *Lac du Flambeau, supra*, 770 F.Supp. 480, and that court's application of the *Cabazon* test. In order to avoid the mandatory-compact consequences that befell Connecticut in *Mashantucket Pequot, supra*, California suggested that the dispute be submitted to the federal courts for disposition in an action for declaratory relief. The action was filed in 1992, and there has yet to be a final disposition of the dispute. *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 41 F.3d 422, 426 (9th Cir. 1994), pet. rhrg. pending.[15]

As a result of the ambiguity created by the *Cabazon* test, and the unwillingness of California Tribes to await

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[15] Indeed, the Court may take judicial notice of the fact that, despite the Ninth Circuit's ruling in *Rumsey*, other California Tribes persist in litigating against California for refusal to conduct face-to-face negotiations about casino games that are categorically prohibited by Cal. Pen. Code §§ 330, 330b, and 330.1. *See* Memorandum of Points and Authorities in Support of Motion for Summary Judgment, p. 16, line 25, *Soboba Band of Mission Indians v. Wilson*, E.D.Cal. No. S-94-1770 ["frivolous" for State to refuse to meet with Tribe for purposes of discussing compact covering games prohibited by Cal. Pen. Code § 330].

the outcome of *Rumsey Indian Rancheria*, there are now over 7,500 slot machines operating illegally on Indian lands in California.[16] As early as the Fall of 1991, the three Indian Tribes in this proceeding installed and operated gambling devices of the sort in dispute in the *Rumsey Indian Rancheria* litigation.[17]

The United States has been unwilling to take action against the Tribes in this case for operating slot machines in violation of IGRA.[18] Moreover, in the Central District

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[16] The Court is requested to take judicial notice of this fact, which can readily be verified by investigative records of the California Department of Justice, the Federal Bureau of Investigation, and the National Indian Gaming Commission. F.R.Evid. 201.

[17] The Court may take judicial notice that, in March 1995, Riverside County Sheriff's deputies seized some 29 slot machines on an interstate freeway in California, destined for the casino operated by the Twenty-Nine Palms Band of Mission Indians. The County has now been sued for recovery of the devices by a corporation chartered by the Coeur d'Alene Tribe of Idaho. Among other things, the plaintiff contends that California has no jurisdiction over Indian gaming matters or over gaming equipment owned by an Indian Tribe. *Stick Games, Inc. v. Riverside County, California*, C.D.Cal. No. 95-2629.

[18] The Court is requested to take judicial notice of the fact that the United States Attorney for the Southern District of California has expressly and publicly stated that he will not take action against the Sycuan, Viejas, or Barona Bands until there is a resolution of the dispute in *Rumsey Indian Rancheria*. Shortly after the district court's decision below, the Sycuan, Barona, and Viejas Tribes collectively installed more than 2,500 new slot machines. The U.S. Attorney's agreement with the three San Diego County Tribes included a condition that no other Tribe in the Southern District would be permitted to open a class III casino. *See* "U.S. Attorney and tribes OK gaming truce," *The San*

of California, enforcement of the Organized Crime Control Act against slot machine operation on Indian lands has been barred by the federal court, based on this Court's *Cabazon* test. *See* note 7, *supra*. As a consequence, Indian Tribes in California have been able to run roughshod over the IGRA and state gambling laws, and California must pay the price in casino-related crime. *Cf., Cabazon, supra,* at 220-221 [state's concern about organized crime insufficient to overcome preemption], *but see, Cabazon* at 226-227 (Stevens, J., dissenting).[19]

Diego Union-Tribune, p. A-1 (July 1, 1994). Not surprisingly, when the United States recently sought injunctive relief against another San Diego Tribe attempting to open a new casino, the United States was met with a defense of unfair treatment. *United States v. Rincon Band of Mission Indians*, S.D.Cal. No. 95-0557.

[19] For example, in 1992, Criminal Case No. 92-26, the United States established before the District Court for the Southern District of California that "the mafia had infiltrated the gaming establishment on the Rincon Band Reservation." *See*, Order re Contempt, ¶ 7, *United States v. Rincon Band of Mission Indians*, S.D.Cal. No. 95-557 (May 5, 1995). At that time, the Rincon Band was operating only a high-stakes bingo establishment. In addition, Cross-Petitioner has already adverted the Court to the 23-count indictment related to the use of slot machines on the Morongo Reservation, also in southern California. *See* note 7. The Court is also requested to take judicial notice of the fact that between March and June 1995, violent disputes erupted in three northern California Indian casinos, at least one involving gunfire. *See* "Attorney General seeks gambling crackdown," *Orange County Register* (June 15, 1995). One of the casinos was shut down by one tribal faction disputing with another over distribution of casino earnings and the lack of any accountability for revenue. As one tribal faction reported, "The casino has earned about $6 million since it opened but there's no accountability. We don't know where the money has gone." "Tribe feud shuts Clear Lake casino," *Santa Rosa Press Democrat* (June 10, 1995).

The Court should issue the Writ to clarify the confusion relative to the limits of the *Cabazon* prohibitory/regulatory test. In deciding whether the Tribes here had exclusive jurisdiction to regulate slot machines on their Indian lands, *see discussion*, pages 7-8, *supra*, the Court should clarify that California's "criminal law and public policy" is reflected in the statute itself. That is to say, the Court should make clear that Cal. Pen. Code § 330.1 is itself an expression of California's public policy, and courts are not expected to "second guess" the California Legislature to determine whether, though slot machines are clearly *prohibited* by statute, the state "policy" toward slot machines may be something *other* than prohibitory of slot machines.[20]

Even more importantly, the Writ should issue in order to bring an end to the state of lawlessness that exists on Indian lands in California, and the potential for even greater expansion thereof, that has resulted from confusion concerning the meaning of this Court's *Cabazon*

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[20] Such "second guessing" is reflected, for example, in *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, E.D.Cal. No. 92-812, Amended Order on Cross-Motions for Summary Judgment, pp. 14-15 (July 20, 1993) ["The combined effect of IGRA and *Cabazon* is that a two step analysis must be used . . . . First, the court must ascertain whether the state permits each proposed game to be played . . . . [¶] In the case where a proposed game has *not* been permitted by the state, the court must proceed to the second step of its analysis. In such instance, Congress has directed the courts to employ the *Cabazon* analysis to determine whether the proposed game violates the state's public policy." (emphasis added)], rev'd, *Rumsey Indian Rancheria v. Wilson*, *supra*, 41 F.3d 422 (9th Cir. 1994).

test.[21] The Court is urgently requested to issue the Writ and revisit its articulation of that test.

D. The Writ Should Issue To determine Whether The Tribes' Petition Presented A Case Or Controversy Within The Meaning Of Article III Of The Constitution.

Cross-petitioner contends that the Tribe had no standing to sue for the purpose of asserting federal claims belonging to the state defendants. The Court of Appeals, however, found that the Tribe had standing by analogizing the condition of the Tribes here to that of the Tribe in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). The two situations are manifestly distinguishable.

In *Mescalero Apache Tribe*, the Tribe was seeking to protect its jurisdiction over hunting and fishing by non-Indians. Unlike hunting and fishing, however, the Tribes here have no jurisdiction to regulate slot machine gambling on their reservations. 25 U.S.C. §§ 2701(5), 2710(d)(1)(C). Since slot machine gambling is prohibited as a matter of state law, Cal. Pen. Code §§ 330a, 330b, 330.1, it is unlawful on Indian lands as well. 25 U.S.C. § 2710(d)(1)(B). Furthermore, even in those cases where slot machine gambling is permissible on Indian lands because is it permitted in the State, *see* 25 U.S.C. § 2710(d)(1)(C), a Tribe *acquires* jurisdiction to regulate

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[21] The Court is requested to take judicial notice of the fact that, in addition to the existing 25 or so class III casino operations already in existence, another 25 casinos are planned for the relatively near future. *See*, California Department of Justice, *Intelligence Operations Bulletin*, vol. 60 (June 1995).

the activity only pursuant to a tribal-state compact. 25 U.S.C. § 2710(d)(1)(C); *see*, 25 U.S.C. §§ 2710(d)(3)(C)(ii) [tribal-state compact to address allocation of regulatory jurisdiction between Tribe and State], 2710(d)(6) [slot machine prohibitions of 15 U.S.C. § 1175 apply unless slot machines are lawful in the State and the gambling is conducted pursuant to an approved tribal-state compact].

Here, no tribal-state compact exists; therefore, the Tribes have no regulatory jurisdiction over slot machine gambling on their lands. Unlike *Mescalero Apache Tribe*, then, the Tribes' suit cannot be said to have been brought in furtherance of any tribal regulatory jurisdiction over the disputed conduct.

Indeed, because slot machine gambling is prohibited on Indian lands by federal law, 15 U.S.C. § 1175; 25 U.S.C. § 2710(d)(6); *see also*, 25 U.S.C. § 2710(d)(1)(B), and because Indian Tribes in California have no jurisdiction to regulate slot machine gambling on their lands, the Tribes here suffer no judicially cognizable injury as a result of state prosecution of their agents for slot machine gambling. The district court therefore lacked jurisdiction over the Tribes' complaint. U.S. Const., Art. III., § 2, cl. 1.[22]

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[22] The Tribes cannot ground Article III jurisdiction on a theory that prosecution of their casino managers jeopardizes gambling revenues. As a matter of federal law, without a tribal-state compact, the Tribes may not lawfully generate or earn revenues from slot machine gambling. 15 U.S.C. § 1175; 25 U.S.C. § 2710(d)(1)(B), (C). Accordingly, the Tribes can have no judicially cognizable economic interest in preventing the prosecution of their casino managers for violation of Cal. Pen. Code § 330.1.

E. The Court Should Issue The Writ And Reverse Because The District Court Was Clearly Barred By 28 U.S.C. § 2283 From Enjoining The State Criminal Prosecutions.

The Court of Appeals ruled that the bar of 28 U.S.C. § 2283 did not apply here because the injunction "was necessary to preserve federal jurisdiction over Indian gaming [under 18 U.S.C. § 1166(d)] and it was 'authorized by Congress.' " Pet. Appx. A-12. The ruling is patently erroneous.

The bar against injunction of state court proceedings is not excused when the injunction is employed to preserve federal jurisdiction, generally, but rather, when it is employed "in aid of *the court's* jurisdiction." 28 U.S.C. § 2283 (emphasis added). The district court relied on *White Mountain Apache Tribe v. Smith Plumbing Co.*, 856 F.2d 1301 (9th Cir. 1988) as support for the injunction, but the Court of Appeals agreed that *Smith Plumbing* is inapposite. Pet.Appx. A-12 n. 4.

The Court of Appeals also ruled, without relevant supporting authority, that the injunction is authorized by IGRA.[23] That Act does confer equitable jurisdiction upon federal courts to redress claims by Tribes that States have

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[23] The Court of Appeals cited *Capital Service, Inc. v. NLRB*, 347 U.S. 501 (1954) as an example of an injunction against state court proceedings, "because federal law preempts state jurisdiction over unfair labor practices." However, as is clear from this Court's decision in *Capital Service, Inc.*, the injunction was deemed permissible only "in aid of the court's jurisdiction" in a proceeding then before the district court under the National Labor Relations Act.

failed to negotiate in good faith and to enjoin unlawful class III gaming in violation of a compact. 25 U.S.C. §§ 2710(d)(7)(A)(i), (ii). No other federal right enforceable in equity is created by IGRA, and there is no support for the proposition that Congress intended to give *Tribes*, as contrasted, perhaps, with state criminal defendants, a right to enforce in equity the provisions of 18 U.S.C. § 1166(d). Moreover, the relevant congressional purpose behind IGRA – viz., the conduct of only *permissible* class III gaming on Indian lands and, then, only pursuant to regulation under a tribal-state compact – can be satisfactorily accomplished by permitting the state criminal prosecutions to proceed unabated. *Cf., Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977) [Clayton Act does not authorize injunction against state proceedings].

F. The Court Should Issue The Writ And Reverse Because The District Court Exceeded Its Jurisdiction By Failing To Dismiss The Action Pursuant To *Younger v. Harris*.

In rejecting the District Attorney's protest that dismissal of the action was required pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), the Court of Appeals stated: "While the State may well have an interest in seeing that the federal government enforces the State's laws in Indian country, it can have no legitimate interest in intruding on the federal government's exclusive jurisdiction to prosecute." Pet. Appx. A-14. However, as noted earlier, state court prosecution for slot machine gambling on Indian lands is not at all intrusive of federal interests.

Congress limited state criminal prosecution of gambling offenses only out of deference for traditional concerns of tribal sovereignty. *See*, S. Rep. 446, 100th Cong., 2d sess., 5-6 (1988). But the notion of tribal sovereignty does not encompass a prerogative to contravene federal law. Stated otherwise, Tribes have no sovereign interests – inherent or otherwise – in preventing state court prosecutions for slot machine gambling by non-Indians in contravention of IGRA, even when the unlawful conduct is sponsored by the Tribe itself.[24]

Exclusive federal prosecution under 18 U.S.C. § 1166(d) is not an end in itself, but is rather intended to serve a congressional interest of acknowledging tribal sovereignty. That federal interest is not undermined, however, when there is no legitimate tribal sovereignty interest that is served by excluding state prosecution. The district court should have dismissed the Tribes' action in deference to the state court proceedings pursuant to *Younger v. Harris. Cf., Seneca-Cayuga Tribe v. Oklahoma*, 874 F.2d 709 (10th Cir. 1989) [*Younger* does not apply where state action is brought to enjoin tribal gaming activity that promotes congressional purpose].

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[24] Once the district court rejected the Sycuan Band's claim that the Autotab Model 101 is a class II gaming device, Pet. Appx. E, the court had no alternative but to conclude that the machines were being operated in violation of IGRA. 25 U.S.C. § 2710(d)(1)(C). As a matter of law, then, the Band could have no interest in preventing state prosecution of non-Indians managing the machine operations.

CONCLUSION

There is a long history in California of prohibiting and vigorously prosecuting slot machine gambling. The California Constitution prohibits the Legislature from authorizing casinos "of the type currently operating in Nevada and New Jersey."[25] California law even prohibits the State Lottery from employing the theme of slot machines in its lottery tickets. Cal. Gov. Code § 8880.28.

Nevertheless, and despite no change in California law, there are now some 7,500 slot machines operating illegally in some 25 Indian casinos located throughout the State. California law enforcement officials have been barred by the courts below from stopping the expansion of casino gambling in California, and the Federal Government seems to be paralyzed to do anything about it. Indeed, one district court has also barred even the *Federal Government* from taking any action against the slot machines under the Organized Crime Control Act. All the while, there seems to be no reasonable doubt that slot machines are unlawful – as a matter of federal law – on Indian lands in California, at least without a tribal-state compact.

There is a state of lawlessness on Indian lands in California that has its roots in this Court's decision in

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[25] This provision was enacted in 1984, three years prior to this Court's decision in *Cabazon*. There is, perhaps, no small irony in the fact that, as a result of the confusion surrounding the prohibitory/regulatory test adopted by this Court in *Cabazon* and the confusion surrounding the relationship of that test to IGRA, Nevada and New Jersey are no longer the only States hosting casinos.

Cabazon. The Court is urgently requested to issue the Writ and eliminate this impediment to state law enforcement.

Respectfully submitted,

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APPENDIX

No. 94-2064

In The

Supreme Court of the United States

October Term, 1995

PAUL PFINGST, District Attorney of
San Diego County, California,

Cross-Petitioner,

v.

SYCUAN BAND OF MISSION INDIANS, *et al.*,

Cross-Respondents,

**Cross-Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

CROSS-PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SYCUAN BAND OF MISSION INDIANS, Plaintiff-Appellee/ Cross Appellant, v. JIM ROACHE, Individually and as Sheriff of San Diego County, Defendant, and EDWIN L. MILLER, JR., Individually and as District Attorney of San Diego County Defendant-Appellant/ Cross-Appellee.	No. 93-55430/ 93-55431 DECLARATION OF WILLIAM J. COLLINS

I, WILLIAM J. COLLINS, hereby declare that I was the Deputy District Attorney assigned to prosecute the cases of People of the State of California versus James Thomas Trant and People of the State of California versus Emmett Munley, Helen M. Chase and Roy C. Palmer.

These cases resulted from the service of search warrants on the Sycuan and Barona Indian reservation casinos on October 30, 1991, during which slot machines were recovered. Upon reviewing the official reports of the San Diego County Sheriff's Department regarding those searches, it was my understanding that Mr. Trant was the business manager of the Sycuan tribe, and thus responsible for the day-to-day operations of the casino. It was also my understanding that Mr. Munley was the casino manager for the Barona casino, Mrs. Chase the assistant manager and Mr. Palmer, a resident of Illinois who owned Interstate Gaming Services, Inc., the suppliers of the slot machines found at Barona. I issued San Diego Municipal Court Case No. M635264 against Mr. Trant and No. M635263 against Mr. Munley, Mrs, Chase and Mr. Palmer. None of the people named in the complaints were tribal members, but were non-Indian professionals who ran the casinos or supplied gambling machines to the casinos.

I did not issue charges against any tribal members because it is my experience that, in San Diego County, casinos on Indian reservations are not run by the tribal chairmen or other tribal members, the practice being that the tribes hire outside professionals to conduct casino operations. I felt that the gaming professionals who operated and supplied the casino were responsible for any illegal activities in the casinos. I further felt that the non-

professional tribal members were not likely to be familiar with the rather complex laws affecting casino operations and would take the advice of those hired to run them.

A similar search warrant had been served at the Viejas reservation and similar slot machines recovered. At Viejas, however, the sheriff's deputies had not been able to determine the identity of the casino manager. The sheriff's deputies involved in that service named Anthony Russell Pico as the suspect, simply because he was the tribal chairman.

It is the custom of the San Diego County District Attorney's Office to send letters to charged defendants, upon the filing of misdemeanor charges, notifying them of the charges filed and the date and time arraignment has been set. These letters are prepared by our issuing clerks before any complaint is physically taken to court for filing. They are then sent out in the normal course of business. No warrants are issued in these cases unless the defendant does not appear for arraignment. In the instant cases, no defendants were arrested and notification letters were sent to all charged defendants.

I am informed that Mr. Pico also received such a letter bearing Municipal Court Case No. M635265. I have attached a copy of that letter as Exhibit "A". This was the result of an error on my part in preparing issuing documents in his name due to his being identified as the suspect by sheriff's deputies. When I realized that Mr. Pico was the tribal chairman, and was not involved in casino operations, I withdrew the issuing documents before charges were filed against him. Since no case was filed using number M635265, that number was later used

in the filing of a hazardous waste complaint against one Walter Michael Breining, a person unrelated to the instant litigation. I have attached a copy of the complaint in Mr. Breining's case as Exhibit "B".

As a result, a review of cases filed in the San Diego Municipal Court will reveal that no case has ever been filed against Mr. Pico for Possession of Slot Machines, and the only cases bearing his name are his convictions for Assault With a Deadly Weapon and Driving Under the Influence of Alcohol.

I swear the above is true and correct under the penalty of perjury.

Executed this sixteenth day of May, 1994, at San Diego, California.

/s/ William J. Collins
WILLIAM J. COLLINS
Deputy District Attorney